

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SOKOLOW, et al, : 04-CV-397
:
Plaintiffs, : November 22, 2011
:
v. : 500 Pearl Street
: New York, New York
PALESTINE LIBERATION ORGANIZATION, et al, :
:
Defendants. :
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TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE RONALD L. ELLIS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE COURT: Good afternoon. This is Judge Ellis.
2 Could I have your appearances?

3 MR. TOLCHIN: Good afternoon, Your Honor. Robert
4 Tolchin for the plaintiff.

5 MR. HILL: Good afternoon, Your Honor. Brian Hill
6 for the defendants, Palestinian Authority and the PLO.

7 THE COURT: This is a conference in Sokolow v.
8 Palestine Liberation Organization, et al. It's 04-CV-397. It
9 is Tuesday, November 22nd at approximately three p.m.

10 Does somebody have an application for me? Is that
11 what this is about?

12 MR. HILL: Yes, Your Honor. Brian Hill on behalf of
13 defendant. Your Honor, this call is as I requested from our
14 status conference last Thursday regarding the deposition of
15 Musab Hassan Youseff [Ph.], and if Your Honor will recall the
16 individual that the plaintiff named at their initial
17 disclosures the plaintiffs have served him with a subpoena to
18 appear for a deposition on Monday, November 28th, and when we
19 learned that they had subpoenaed him we the next day served him
20 with a document subpoena for production of relevant documents.
21 The return date on that subpoena was yesterday, Monday,
22 November the 21st. We did not receive a production from Mr.
23 Youseff. We did not receive objections to the subpoena either
24 and today we have filed a motion to compel those documents in
25 the District Court for the Western District of Pennsylvania

1 which is where we served him with the subpoena.

2 We have not heard from the witness. The plaintiffs
3 have not heard from him either. At this point we do not know
4 if the witness will be appearing on Monday for a deposition and
5 if he doesn't appear the defendants don't have an issue.
6 However, if he does appear I'm going to make an application to
7 the court today that the court either continue the deposition
8 to a date after we've had an opportunity to have a ruling on
9 our pending motion to compel his documents and received those
10 materials or alternatively, that the court order that the
11 deposition be taken only for discovery purposes and not be
12 admissible at trial.

13 My rationale for this request is as follows, Your
14 Honor. This individual claims to have been a member of Hamas
15 who worked for the Israeli Shin Bet as it was called. This is
16 their intelligence or counterintelligence unit. He is not a
17 neutral witness. He is by his own admission a member of my
18 client Afilo's [Ph.] rival, the Hamas faction. He was working
19 and may still be working for the Government of Israel which is
20 currently occupying the Palestinian territory that the PA
21 governs a portion of and the Palestine Liberation Organization
22 has been involved in trying to obtain sovereignty over, and he
23 has exhibited in his book personal animosity toward both of my
24 clients.

25 Your Honor, if I may just read a couple of sentences

1 from his book. This is on Page 33 of the book entitled Scent
2 of Hamas which is written by this witness. He says "Even as a
3 young boy I felt the PLO was correct and self serving." On
4 Page 61 of his book he learned about the shooting deaths of
5 former Israeli Prime Minister Yitzhak Rabin and he wrote "I was
6 very happy for his death and the damage it would do to the PLO
7 and its watered down capitulation to Israel," and on Page 62 of
8 the book he writes "I hated the Palestinian authority of Yasser
9 Arafat."

10 So this is clearly a witness that's going to be
11 adverse to my client. I can also note here that in another
12 case that Mr. Tolchin and I had where he was representing
13 plaintiffs against my clients Mr. Tolchin designated this
14 individual as an expert witness for the plaintiffs. So he's
15 clearly got some alignment with the plaintiff even if he's not
16 controlled by the plaintiffs.

17 What we're asking the court to do is not allow this
18 witness who is adverse to my client to choose which subpoenas
19 he wishes to obey. It would be patently unfair to my client if
20 he chose to disobey the subpoena we issued to him for documents
21 but chose to obey the plaintiff's subpoena for deposition
22 testimony. It's obviously important to my clients that I be
23 able to receive whatever documents this individual has to be
24 prepared to effectively cross-examine him, and that's
25 especially the case because this individual is someone as Your

1 Honor will recall from our prior conferences, that we don't
2 actually know what his address is. So this may be the only
3 opportunity to receive testimony from him and it would be
4 clearly prejudicial to my clients if the testimony that's taken
5 on Monday is admissible against us in trial.

6 And it wouldn't just potentially be admissible in
7 this case, Your Honor. As you may know, there are four other
8 cases pending against my client in the District of Columbia
9 under this same anti-terrorism act statute. So the prejudice
10 that we would suffer may extend not only to the case before
11 Your Honor but the four other cases where this would
12 conceivably be admissible testimony.

13 Therefore, I'm asking that the court either order
14 that the deposition date be continued which you have the power
15 to do because the subpoena was issued from the Southern
16 District of New York, to a date after we had a chance to
17 litigate our motion to compel in the Western District of
18 Pennsylvania and get whatever documents this individual is
19 going to produce or alternatively rule that the deposition be
20 taken only for discovery purposes and not be admissible at
21 trial and that way if the plaintiffs want to use him at trial
22 there would be a future opportunity for him to be -- to testify
23 and be cross-examined at which point we would presumably have
24 gotten whatever documents we would get. That's the application
25 I'm making today, Your Honor.

1 THE COURT: Did the plaintiffs indicate that they
2 intended to use this testimony at trial?

3 MR. HILL: Your Honor, I've asked Mr. Tolchin that
4 and he has declined to accede to either of the remedies I have
5 proposed, either delaying the deposition or agreeing that it
6 would not be admitted at trial.

7 THE COURT: He's not affirmatively sought to have it
8 taken as if it would be admissible at trial.

9 MR. HILL: Well, Your Honor, my concern is that if it
10 is taken under these circumstances there is a risk that it
11 would be admitted at trial. I realize I have some arguments
12 about whether I had an effective opportunity to cross-examine
13 him but I would appreciate given the equities that the court
14 would make that clear at the outset particularly because as I
15 said it will have [inaudible] in other cases as well, Judge.

16 THE COURT: Mr. Tolchin.

17 MR. TOLCHIN: Thank you, Your Honor. This witness was
18 identified in our initial disclosures. The defendants never
19 sought documents from him, never pursued him in any way even
20 though they know about him and they know about him even from --
21 not from within this case.

22 THE COURT: Before you continue, I thought they had at
23 least at the last conference and in this conference had
24 indicated they did not have an address for him. How would they
25 have pursued it without an address?

1 MR. TOLCHIN: Well, the same way that we did. We
2 found him on -- we monitored him on Google. We kept doing
3 Google searches to try to find him and we do not know where he
4 resides and two private investigators were unable to find him
5 for us. He does speak publicly [inaudible]. He's appeared on
6 television. He speaks in all sorts of public forums and when
7 we served him our subpoena and when the defendants served their
8 subpoena afterwards both of those were done at a public forum.
9 In the case of our subpoena I personally attended the event and
10 handed him the subpoena.

11 THE COURT: Okay.

12 MR. TOLCHIN: The fact that the defendants' interest
13 in this -- in documents from this witness did not begin until
14 we served a subpoena for his deposition. When we were before
15 Your Honor last -- as recently as last Thursday, defense
16 counsel made the same pitch to Your Honor, continue the
17 deposition until they can get documents or move to compel
18 documents, and Your Honor's observation that this is a
19 resistant witness and that we should do the deposition and take
20 our best shot and we might have to continue the deposition on a
21 further date. We can -- as I mentioned to Your Honor at that
22 time that we can always -- it certainly would improve the
23 defendants' arguments about documents if they had a chance to
24 question him, do you have this document and do you have that
25 document, do you have any documents responsive to the subpoena.

1 If they ask him does he have documents responsive to some
2 demand they've made and he says he doesn't have anything like
3 that well, that would deal with that issue.

4 To prejudice the question about whether the testimony
5 would be admissible or not at trial would be unfair.
6 Depositions taken under the Federal Rules of Civil Procedure
7 generally are useable at trial. To say right now that we're
8 going to do this deposition but you can't use it at trial would
9 be unfair. I don't know -- when we asked him do you have any
10 documents he may say no. He may say I came here with the shirt
11 on my back, I left everything I had I left in Israel and I
12 can't go back there. He may -- this issue of documents may be
13 a complete non starter.

14 Obviously after the deposition, depending what he
15 says, the defendant is free to make whatever application they
16 may want to make and the judge -- and the judge can -- the
17 court can make a ruling as to what the transcript can or cannot
18 be used for at that time. There's no need to make a ruling in
19 advance not having any facts.

20 We have a practical matter. There is no way to
21 adjourn this deposition. We have no way to inform the witness.
22 The only thing the witness has is a subpoena telling him to
23 come on Monday. I should mention that when we -- that when the
24 defendant moved to compel the production of documents in their
25 motion to compel the production of documents they told the

1 court in Pennsylvania that "should the court grant defendants'
2 motion, defendants' will likely need to personally serve Mr.
3 Youseff with the court's order at the time of the deposition if
4 he appears." In other words, that's seeking an order in
5 Pennsylvania that they want to obtain somehow and give to the
6 witness at his deposition which is scheduled for Monday.

7 By the way I should mention, I'm not quite sure what
8 the court in Pennsylvania is going to do with this application
9 considering that I doubt the motion has been served on Mr.
10 Youseff because they have no way to serve it on him because
11 they don't know where he is.

12 I agree with the ruling that Your Honor made that
13 this is a resistant witness and we should see if he shows up
14 and depose him, see what we get, and we can deal with the
15 product of what we get after we [inaudible].

16 MR. HILL: Your Honor, may I briefly be heard --

17 THE COURT: Go ahead.

18 MR. HILL: -- in response to the points Mr. Tolchin
19 made?

20 THE COURT: Yes.

21 MR. HILL: Mr. Tolchin's claiming he's a resistant
22 witness and that may be the case but my point is it's not fair
23 for him to resist my subpoena and not Mr. Tolchin's, and that
24 given the history of bias against my clients I'm concerned
25 about what may be a real prejudice that we'll suffer. Mr.

1 Tolchin has suggested that there might no be documents. The
2 subpoena I'm not sure if it's in the record before Your Honor
3 but I could certainly provide it to you, it asks for documents
4 that were clearly created after this individual immigrated to
5 the United States including his information about his
6 application for asylum in the United States. He was a resident
7 of the West Bank. I suspect his asylum application indicates
8 that he fears persecution by my clients which would be
9 important evidence of bias we'd like to have. That's for
10 documents pertaining to the book including drafts and notes
11 about the book and that would obviously have been done when he
12 wrote the book after he left the West Bank. So I think he is
13 going to have responsive documents that are going to be
14 relevant.

15 As far as informing the witness goes, following on
16 Mr. Tolchin's lead, we have discovered that the witness is
17 scheduled to speak tomorrow evening in Vancouver, British
18 Columbia and if the court were to grant the relief I'm seeking
19 today of either postponing the deposition or ruling that it
20 could only be used for discovery purposes, we would undertake
21 to personally serve the witness at that event tomorrow night.
22 So he would have notice before Monday so he didn't need to
23 travel to New York if he in fact attends to obey the subpoena
24 from Mr. Tolchin.

25 So I think for those reasons I would renew my request

1 that the court either continue the deposition to a date in the
2 future where we can get the documents or rule that we won't be
3 prejudiced by whatever the witness says on Monday coming in at
4 trial in this case or other cases.

5 MR. TOLCHIN: Your Honor, may I be heard again?

6 THE COURT: Okay. I think I've heard enough although
7 I'm not so sure why one of your alternatives, Mr. Hill, has to
8 be done before the deposition.

9 MR. HILL: I'm happy to answer the court's question.
10 I'm not sure what it is though.

11 THE COURT: Well, your alternatives are that the
12 deposition be continued or that the court limit the way it can
13 be used. I'm not sure what would -- what would prevent me from
14 using a second alternative even after the deposition.

15 MR. HILL: I don't think -- I don't think I would be
16 precluded from making that argument in advance, Your Honor.
17 I'm asking for now in part because it won't only be Your Honor.
18 There will be other courts that may potentially be after
19 [inaudible] and admissibility of those and I believe it would
20 only be fair to my clients whether there be a record in advance
21 that it is only for discovery purposes and cannot be used at
22 trial in this case or any other cases because of the unique
23 circumstance where the witness may be obeying Mr. Tolchin's
24 subpoena and disobeying mine.

25 MR. TOLCHIN: Your Honor, I -- I'm sorry.

1 THE COURT: In that regard it seems to me that a
2 fuller record will make a better case no matter how we
3 ultimately decide this. I don't see given all of the variables
4 here that continuing the deposition is a better alternative
5 than having the parties first of all make sure he shows up and
6 that his deposition is taken.

7 As to what happens to the deposition after that, what
8 I say about it or what any other court says about it, I think
9 part of the determination will be if he shows up for the actual
10 deposition what he says and how cooperative he is in that
11 deposition in terms of whether or not it ought to be useful or
12 used against the party because part of the full and fair
13 opportunity you'll have will depend on how forthcoming he is.

14 So your application is denied. If he shows up for
15 the deposition make the record that you can. If it turns
16 out -- frankly, if he's not cooperative at the deposition with
17 or without documents that would impact on how I would view it.

18 MR. HILL: Okay.

19 MR. TOLCHIN: Thank you, Your Honor. Thank you for
20 taking the time to hear us this afternoon. We understand the
21 court's ruling.

22 THE COURT: Thank you. We're adjourned.

23 MR. HILL: Thank you.

24 * * * * *

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1 I certify that the foregoing is a court transcript from an
2 electronic sound recording of the proceedings in the above-
3 entitled matter.

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5 _____
6 Shari Riemer

7 Dated: December 12, 2011
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